in establishing claims (for an injunction on the vegetable lands) such as to succeed for a permanent injunction at the trial. Nor have the plaintiffs established a legal right to their claim recognizable by the court to enable the court to grant an injunction (See *Gouriet* v. *Union of Post Office Workers*[7]; *Corporation of Birmingham* v. *Allen*[8]). This court is also of the view that damages would be an adequate remedy (*American Cyanamid Co.* v. *Ethicon Ltd.*[9]), and hence the plaintiffs' application for injunction is dismissed with costs.

Order accordingly.

Solicitors: *Tan, Yu & Co.; Shearn, Delamore & Co.*

GAN KIM KIAT & BROS. REALTY SDN. BHD. v. LEANG AH KAN

[A.C.J. (Peh Swee Chin J.) January 20 and February 10, 1983]

[Seremban – Civil Appeal No. 6 of 1982]

Practice & Procedure – Absence of solicitor in civil case is excused and postponement granted – Court must also excuse absence of his client. – Subordinate Courts Rules 1980, 0.28 rr. 5 & 7.

On May 7, 1982, Tampin Magistrate's Court Civil Action No. 43 of 1981 came up for hearing before the learned magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned magistrate ordered that the action by the plaintiff be struck off. Prior to this, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the court to excuse his absence later, but not the absence of his client. Having been so advised, the learned magistrate felt, no doubt, he was entitled to strike out the case.

The solicitor for the plaintiff duly applied to the learned magistrate for the reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in court on May 7, 1982 was due to his mistake in advising the plaintiff that the latter need not be present in court on May 7, 1982. The learned magistrate then made the order reinstating the case for hearing on July 19, 1982. The defendants appealed against the order of reinstatement.

Held, dismissing the appeal: (1) in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorised agent for a plaintiff or a defendant. Such being the case, when a civil case comes up for hearing as fixed, the solicitor can be present without his client;

(2) it follows that, when the absence of a solicitor in any case is excused and a postponement is granted, a court must also excuse the absence of his client;

(3) the learned magistrate was in error when in approving the application by the plaintiff's solicitor for postponement of the case he struck out the case at the same time for he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent;

(4) under the Subordinate Courts Rules 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the Subordinate Courts have been brought in line with those in the High Court so that the requirement of "good reason for absence be shown" mentioned in the repealed Subordinate Courts Rules, 1980, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

(5) the appeal would therefor be dismissed and the plaintiff/respondent was ordered to pay all the costs thrown away on May 7, 1982 and all costs of application for "reinstatement" dated June 28, 1982. Tampin Magistrate's Court Civil Action No. 43 of 1981 would be fixed for hearing early.

CIVIL APPEAL.

F.H. D'Cruz for the defendants/appellants.

Sri Selvarajah for the plaintiff/respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: In my view, this appeal is the result of a great deal of confusion on the part of all parties arising out of a few points of practice and procedure.

The following facts cannot be disputed or appear to be not in dispute. On 7.5.82, Tampin Magistrate's Court Civil Action No. 43 of 1981 came up for hearing before the learned magistrate. The defendants' solicitor and his clients were present while the plaintiff's solicitor and his client were absent. The learned Magistrate ordered that the action by the plaintiff be *struck off.* (the emphasis is mine).

It transpired, that prior to the above episode, the solicitor for the plaintiff had applied for a postponement by letter on medical grounds, asking the court to excuse his absence later, *but not* the absence of his client. (The emphasis is mine again). Having been so advised, the learned Magistrate felt, no doubt, he was entitled to strike out the case.

The solicitor for the plaintiff duly applied to the learned Magistrate for the reinstatement of the above case. In his affidavit filed in support, he stated that the plaintiff's absence in court on 7.5.82 was due to his mistake in advising the plain-

tiff that the latter need not be present in court on 7.5.82. The learned Magistrate then made the order reinstating the case for hearing on 19.7.82. From this order made on 19.7.82, the defendants have now appealed.

Learned counsel for the defendants/appellants argued before me that the learned Magistrate was wrong in relying on Order 28 rule 5 of the Subordinate Courts Rules, 1980, whereas he should have relied on Order 28 rule 7. Order 28 rule 5(1) states –

"if, when an action is called on for hearing, neither party appears, the action may be struck out, without prejudice, however, to the restoration thereof, on the direction of the Judge."

Order 28 rule 7 on the other hand reads –

"If, when an action is called on for hearing the defendant appears but the plaintiff does not appear the Court may:

(a) if the defendant has no counterclaim, dismiss the action with costs;

(b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim; and

make any other order as it thinks just."

I agree with learned counsel that Order 28 rule 7 should have applied, but from the grounds of judgment of the learned Magistrate, there can be no doubt that he had treated the matter on the basis of Order 28 rule 7, and therefore, in substance, the complaint of learned counsel would appear to be of no avail to him. I will deal more with this later.

Learned counsel for the defendants/appellants argued further that the defendants' solicitor was given no opportunity of being heard, a very serious complaint indeed from its very nature. However, what actually happened does not bear it out at all. The defendants/appellants, in fact, were served with the copy of the application for "reinstatement", and the copy and the facts of its service were duly brought to the attention of solicitor for the defendants/appellants. The solicitor then asked his clients (as was ascertained from both counsel at the Bar table) to appear in court on 19.7.82 to ask for an adjournment as he was not free. The notes of evidence do not however mention any application for postponement by defendants' solicitor.

The first point is as to what happens when a case is called up when certain parties are absent. Order 28 rule 5(1) applies when both parties to the case, are absent, and the court has a discretion to strike out the case, without prejudice to its restoration. When a case is so struck out, then, it does not involve, in my view, a judgment in default for a plaintiff, nor an order dismissing the claim with costs of the plaintiff in favour of a defendant. It means that the case is struck out of the list of hearing for that day. What then is required to be done by restoration, commonly referred to in practice as reinstatement? Surprisingly enough, there is a dearth of authority on this, but in my view, any request or application for restoration should normally be granted readily by the court unless the absence of the plaintiff was either intentional or contumacious.

Order 28 rule 5 mentioned above would not apply to the facts of the instant matter for the solicitor for defendants/appellants and his clients were present on 7.5.82 while the plaintiff and his solicitor were absent. The proper order in this case, on 7.5.82, apart from an adjournment, should have been, when the absence of solicitor was not excused or not previously excused, an order dismissing the plaintiff's claim with costs.

The second point I wish to stress is that in a civil case, unlike a criminal case, a litigant can always be represented by his solicitor who is a duly authorised agent for a plaintiff or a defendant. Such being the case, that when a civil case, it follows, comes up for hearing as fixed, the solicitor can be present without his client. If the solicitor is present, and his client is absent, then no court can give judgment (e.g. for a liquidated demand) in default of appearance, when the solicitor's client is defendant or dismiss the claim with costs when the solicitor's client is plaintiff. If the court orders the case to proceed to trial, when a solicitor is present but without his client, then it merely means, in practical terms, that the said solicitor is deprived of a possibly most important and material witness. It follows that, when the absence of a solicitor in any case is excused and a postponement is granted, a court must also excuse the absence of his client.

Having regard to what is stated above, the solicitor for the plaintiff/respondent was in error when, requesting for a postponement, he asked the learned Magistrate to excuse his absence, but not the absence of his client, he thereby unwittingly, misled the learned Magistrate into making the order of striking out the case in the first place.

The learned Magistrate was in error when in

approving the application by the plaintiff's solicitor for postponement of the case he struck out the case at the same time for he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent. If he had refused a request for adjournment, (which he did not), then he should have dismissed the action with costs instead of striking out the action.

The learned Magistrate had treated the case on the basis that he had dismissed the claim of the plaintiff/respondent in default of appearance, for in his grounds, he stated that he was satisfied with the due cause shown for absence and the good cause of action of the plaintiff. I cannot find anything wrong with the basis or materials before him for him to be so satisfied, subject to what I have to say in a moment.

Under the Subordinate Courts Rules, 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the subordinate courts have been brought in line with those in the High Court so that the requirement of "good reason for absence be shown" mentioned in the repealed Subordinate Courts Rules, 1950, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

In the circumstances of this case, I therefore dismiss the appeal with no order as to costs in this appeal but that the plaintiff/respondent shall pay all the costs thrown away on 7.5.82 and all costs of application for "reinstatement" dated 28.6.82. I further direct that Tampin Magistrate's Court Civil Action No. 43 of 1981 be fixed for hearing early.

Order accordingly.

Solicitors: *Tay Leong Siak & Co., Sri Selvarajah and Nirmala.*

BRUNEI REPORT

SWEE PTE. LTD. v. LIM KIAN CHAI & ANOR.

[O.C.J. (Rhind J.) April 3, 1982]

[Bandar Seri Begawan – Suit No. 175 of 1981]

Arbitration – Building contract – Dispute – Application for stay of proceedings in favour of arbitration – Applicability of English Arbitration Act 1950 in Brunei.

The plaintiffs erected a bottling plant for the defendant under a written contract dated July 27, 1977. By a Writ dated November 10, 1981, the plaintiff claimed $21,836 from the defendants for work done under the contract or, on a *quantum meruit* basis. The defendant applied by motion that all further proceedings in the action be stayed pursuant to Clause 38 of the Contract, the plaintiff and the defendants having allegedly agreed to refer to arbitration the matters in respect of which this action is brought.

The facts revealed that when the architect issued his final certificate on December 1, 1978, it showed that the final cost of the job was $336,722, and that the final balance due from the defendants to the plaintiff was $35,025.75. The defendants, however, paid the plaintiff B$13,189.75 leaving the balance of B$21,936 unpaid.

Held, dismissing the defendants' motion: (1) the English Arbitration Act 1950 applies in Brunei;

(2) the architect was not an arbitrator. Hence the provision for the architect to determine disputes between the parties was not an agreement to arbitrate, so that even if the architect had not determined the dispute as clause 38 provided, that would not afford the defendants any ground for a stay;

(3) the court is only given power to stay an action in breach of an arbitration clause. The plaintiffs in this case had done nothing to put themselves in breach of clause 38;

(4) only the plaintiffs could invoke arbitration and thus make arbitration available as an alternative to litigation. Resort to arbitration was plainly unilateral and there was simply no arbitration provision on which the defendants could rely. The right to arbitration rested exclusively in agreement.

Cases referred to:

(1) *Hoffman* v. *Meyer* Hudson's Building and Engineering Contract 10th edn. page 164; 1956(2) S.A. 752.

(2) *Ballantine* v. *Western Hotels (Pty.) Ltd.* Hudson's Building and Engineering Contract 10th edn. page 444; 1960(4) S.A. 137

CIVIL SUIT.

Y.Y. Chin for the plaintiffs.

V. Kumar (*Ronnie Lee* with him) for the defendants.

Cur. Adv. Vult.